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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 71.

LONNIE AFFRONTI, PETITIONER,

VS.

UNITED STATES OF AMERICA.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

The opinion of the United States Court of Appeals for the Eighth Circuit is found in *Affronti* v. *United States*, 321 F. 2d 150.

Certiorari was granted by this court on June 6, 1955, 349 U. S. 151.

JURISDICTION.

The jurisdiction of this court is invoked by reason of conflict of opinion as to the power of the district courts to suspend execution of sentences after the service of part of which has commenced. (9 Cir.) *Kirk* v. *United States*, 185 F. 2d 185, and (10 Cir.) *Kelley* v. *United States*, 209 F. 2d 639, both holding contrary to *Phillips* v. *United States*, 212 F. 2d 327 (8 Cir.). (8 Cir.) *Affronti* v. *United States*, 321 F. 2d 150; (4 Cir.) *Mann* v. *United States*, 283 F. 2d 936; and (4 Cir.) *Stern* v. *United States*, 219 F. 2d 936.

QUESTION PRESENTED.

Does a District Court have power to grant probation with respect to cumulative sentences, service of part of which has been commenced?

STATEMENT.

The Petitioner, Lonnie Affronti, was indicted by a Federal Grand Jury in the District Court of the United States for the Western District of Missouri, which indictment was returned January 1, 1932, and in ten counts charged him with violation of the Narcotic laws then in effect (R. 1-5).

Twelve years later, January 24, 1944, he was brought to trial before a jury in Kansas City (R. 17). On January 26, 1944, the verdict of the jury found him not guilty as to Count One but guilty as to Counts two to ten, inclusive (R. 17).

The judgment and commitment (R. 6) entered on January 26, 1944, committed Affronti to the custody of the Attorney General "for the period of five years on each of Counts two, three, four, five, six, seven, eight, nine and ten of the Indictment; the sentence imposed on count three to begin to run at the expiration of the sentence imposed on count two; the sentence imposed on count four to begin to run at the expiration of the sentence imposed to run on count three; the sentence imposed on count five to begin to run at the expiration of the sentence imposed on count four; the sentence imposed on count six to begin to run at the expiration of the sentence imposed on count five; the sentence imposed on count seven to begin to run at the expiration of the sentence imposed on count six; the sentence imposed on count eight to begin to run at

the expiration of the sentence imposed on count seven; the sentence imposed on count nine to begin to run at the expiration of the sentence imposed on count eight; and the sentence imposed on count ten to begin to run at the expiration of the sentence imposed on count nine; the sentence herein imposed on count two to begin to run at the expiration or termination of the sentence imposed by the Circuit Court of Ray County, Missouri, which the defendant is now serving in the Missouri State Penitentiary; the execution of the sentences imposed on counts six, seven, eight, nine and ten is suspended and the defendant is placed on probation, under the usual conditions, for the period of twenty-five (25) years; the probation herein granted to begin to run at the expiration of the sentences imposed on counts two, three, four and five, or until said defendant is otherwise discharged as provided by law, without costs."

Upon appeal the judgment was affirmed on October 14, 1944 (*Affronti* v. *U. S.*, 145 F. 2d 3).

The Petitioner did not commence the service of the foregoing sentences until November 14, 1949 (R. 18).

On July 14, 1953, the Petitioner filed in the District Court a Motion to Stay Execution of Sentence and Motion to Modify Sentence and Place Defendant on Probation (R. 11, 12 and 13).

On November 18, 1954, the above motions were overruled by Judge R. M. Duncan and the memorandum filed by Judge Duncan on that date (R. 13 and 14) bases his decision upon the opinion rendered in *Phillips* v. *United States*, 212 F. 2d 327.

Upon appeal to the United States Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed, *Affronti* v. *United States*, 321 F. 2d 150.

ARGUMENT.

The question presented has reached four different circuits in the United States Court of Appeals, but has not been passed upon by this court.

The Fourth Circuit and the Eighth Circuit are in agreement and the contrary opinion finds an agreement between the Ninth and the Tenth Circuits.

It is conceivable that prisoners serving time in the same institution from different districts might be treated differently due to rulings of the Courts of Appeals in which their districts are located. The petitioner, Affronti, now confined to the United States Medical Center for Federal Prisoners, at Springfield, Missouri, has been told that the United States District Court for the Western District of Missouri cannot entertain his motion in which he seeks to have the execution of the sentences yet to be served suspended, whereas a cell mate whose district is in either the Ninth or Tenth Circuits could have such a motion sustained.

In order to reach a clear understanding of the problem presented it is necessary to review the jurisdiction of the sentencing courts to suspend or place on probation persons convicted before them. The Circuit Court of Appeals, Ninth Circuit, recognized the importance of such a step in *Weber* v. *Squier*, 124 F. 2d 618 (Cert. denied 62 S. Ct. 800), when it stated the following:

> "To understand the issue it will be well to recall that power of the District Court to suspend sentences and to release a convicted person under probation, although long assumed by the U. S. District Courts, was held without basis in law by *Ex parte United States*,

1916, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 355."

Thereafter Congress enacted Title 18, U. S. C. A. 724, now Title 18, U. S. C. A., Sec. 3651, which reads, in part, as follows:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition of execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

The federal courts have, in many instances, interpreted the foregoing legislation in regard to the question of what limitations of time are to be placed on the courts in exercising their jurisdiction under the Act. The following quotation from *Pernatto* v. *United States,* (C. C. A., 9th Cir.) 107 F. 2d 372, outlines the court's interpretation of the Act in respect to time. Quoting from the case of *Weiss* v. *United States,* 28 F. Supp. 598, the Court of Appeals in the *Pernatto case, supra,* stated:

> "It will be observed that the power to suspend the execution of sentence given by the act is not expressly limited to the time of imposition of sentence or to the term within which sentence is imposed. On the contrary, it seems clear that it was the intention of the Congress in enacting this remedial and humanitarian legislation that the power to suspend the execution of a sentence should continue until its execution has actually commenced. It has been so held by all four Circuit Courts of Appeals in which the question has arisen. *Nix* v. *James,* 9 Cir., 7 F. 2d 590; *Kriebel* v. *United States,* 7 Cir., 10 F. 2d 762; *Evans* v. *District*

Judge, 6 Cir., 12 F. 2d 64; *Ackerson* v. *United States*, 2 Cir., 15 F. 2d 268. It is true that the Supreme Court held in *United States* v. *Murray*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309, that the power is gone once execution of the sentence commences. It was not suggested in that case, however, that the power must be exercised at the time of imposition of sentence or within the term. On the contrary Chief Justice Taft took occasion to point out that the rulings of the four Circuit Courts of Appeals to which I have referred were not inconsistent with his opinion.

"It must be remembered, as Judge Anderson pointed out in *Kriebel* v. *United States, supra*, that the rule laid down in *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129, to the effect that a federal district court has no power to set aside or alter a sentence after the expiration of the term at which it was imposed, unless the proceeding for that purpose was begun during that term, does not apply to an application to suspend the execution of a judgment. This is for the reason, as was held in *United States* v. *Pile*, 130 U. S. 280, 9 S. Ct. 523, 32 L. Ed. 904, that an order suspending the execution of a sentence does not operate to set it aside. Under such circumstances the sentence remains in full force, its execution merely being suspended."

It is extremely important to keep the distinction between altering or setting aside and suspending in mind. Rule 35 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A., deals with correction or reduction of sentence, but its very title and substance and its purpose is to introduce a "flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court." Title 18, U. S. C. A., Notes of Advisory Committee on Rules, Sec. 396.

"A prisoner serving the first of several consecutive sentences is not serving the other sentences."
McNally v. *Hill (Warden)*, 293 U. S. 131.
Crow v. *U. S.*, 186 F. 2d 704 (C. C. A. 9th Cir.).

In those cases defining the inherent jurisdiction and power of the courts to reduce sentences during the term, no problem of statutory interpretation is involved as in those cases measuring the powers conferred upon the courts by the Probation Act. And in construing the Probation Act we are not concerned with the inherent powers of the Court to reduce sentences because (1) Congress has whatever power is needed to confer the authority granted to the courts in the Probation Act, and (2) probably the granting of probation and suspension of execution of sentence does not "set aside or alter" the sentence, as seems to have been conceded in *Nix* v. *James, supra; Kriebel* v. *United States*, (C. C. A. 7, 1926) 10 F. 2d 762.

This court failed to make the distinction between the two categories of cases when, in the leading case of *United States* v. *Murray, supra*, construing the powers conferred upon the courts by the Probation Act, in its opinion at page 258 stated:

"* * * The beginning of the execution of sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte Lange*, 18 Wall. 165 * * *."

Later, in the case of *United States* v. *Benz, supra*, the power of the District Court to reduce a sentence during the term but after the commencement of sentence was being questioned. And this court, after referring to the above quoted language from the Murray case, at page 309 of the Benz opinion; stated:

"* * * The Murray case involved the construction of the Probation Act, not the general powers of the

Court over its judgments. The words quoted were used by way of illustration bearing upon the Congressional intent. That they state the rule more broadly than the Lange case warrants is apparent from the foregoing review of that case * * *."

Thus while cases not involving the Probation Act now clearly sustain inherent powers of the District Courts to reduce valid sentences during the term and regardless of the commencement of execution of sentence, it is equally clear in cases involving the authority conferred upon the District Courts by the Probation Act that regardless of the status of the term of court the commencement of the execution of sentence by even one day deprives the Court of the authority conferred by the Probation Act.

The reasoning of the Murray opinion followed the Court's reasoning in *Ex parte United States*, *supra*, in holding that except as provided by the Probation Act District Courts at no time had authority to suspend execution of sentence.

In the Murray opinion this court referred to a report from the Judiciary Committee on a prior attempt to enact Probation Legislation, and referred to the parole powers of the Board of Parole and the powers of clemency of the President under the Constitution. Then the Court reasoned that in view of the parole and clemency powers, Congress must not have intended in the Probation Act to extend the power of the courts during the entire period until the complete expiration of the sentence. And the Court stated, at page 357:

"A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can."

The reasoning and language of the Murray opinion seemed to exclude from the benefits of the Probation Act any former prisoner and anyone for whom any prison time under any sentence was contemplated.

Thus where consecutive sentences were imposed upon different counts of the same indictment it was later held that the Court could not grant probation and suspend execution of sentence conditional upon the serving of a prior sentence.

> *United States* v. *Greenhaus*, (C. C. A. 2, 1937) 85 F. 2d 116, cert. denied 299 U. S. 596, 57 S. Ct. 192, 81 L. Ed. 439.

In the Greenhaus case the Court referred to the Murray case and its reasoning and stated, at page 117:

> "* * * Following the reasoning of that decision, it has been held that where sentence is suspended and probation follows it cannot be made conditional on serving a prior sentence * * *."

However later in the case of *Frad* v. *Kelly*, (1937) 302 U. S. 312, 58 S. Ct. 188, 82 L. Ed. 282, this court had before it on certiorari to the Court of Appeals for the Second Circuit, a set of facts which differed from the Greenhaus case only in that the sentences were imposed under separate indictments tried together. And the court held, without mentioning the Greenhaus case, that the District Court had the power under the Probation Act to suspend the imposition of sentence on one indictment and grant probation for a period to begin upon completion of execution of sentence on another indictment before the Court at the same time.

Later the Court of Appeals for the Second Circuit had before it a set of facts similar to the facts in the Greenhaus case, viz., separate sentences on the same counts of an

indictment, and the Court of Appeals for the Second Circuit, in the case of *United States* v. *Cosman*, (C. C. A. 2) 94 F. 2d 1020, decided the matter in a *per curiam* opinion solely on the authority of the Greenhaus case, and was reversed by this court in *Cosman* v. *United States*, (1938) 303 U. S. 617, 58 S. Ct. 527, 82 L. Ed. 1083, decided by the court *per curiam* on the theory of *Frad* v. *Kelly*, *supra*.

Thereafter, the Court of Appeals, after thoroughly reviewing the cases, clearly interpreted the present law in its ruling in *Weber* v. *Squier*, *supra*, where the Court, at page 621, stated:

> "Since the doctrine of the Greenhaus case appears to be overruled and disapproved there was nothing wrong with the District Court's order in the instant case in sentencing petitioner to the penitentiary upon one count and at the same time sentencing him and suspending sentence under a period of probation under another count of the same indictment."

In view of the above cases it is now clear that for the purposes of the Probation Act consecutive sentences imposed on counts of the same indictment are not to be considered as a single sentence. So the commencement of execution of one sentence does not deprive the Court of its authority to exercise probationary power over the other sentences with respect to which the Court has, prior to the commencement of the execution of any of the sentences, granted probation and suspended execution of sentence.

Therefore, if the proposed future exercise of probationary power by the Court under such circumstances does not so conflict with the executive prerogative as to bring the case within the limitation prescribed by *United States* v. *Murray*, *supra*, then the mere act of the Court during the execution of the prior sentence in granting such probation and ordering suspension of execution of sentence

similarly does not conflict with the executive authority so as to bring the instant case within the probation of the Murray case. It has been so held with respect to consecutive sentences imposed in different districts under different indictments.

United States ex rel. Edelson v. *Thompson, supra.*

It is further submitted that the act of granting probation and suspending execution of sentence can only materially conflict with the executive authority where such act of the Court attempts to effect at the time of the Court's order the release of a prisoner from the custody of the Executive Department.

The granting of probation to the petitioner herein and suspending the execution of his sentences on the counts which he has not commenced to serve would not conflict with the authority conferred upon the Board of Parole. As a matter of fact, the petitioner is seeking relief herein because he is not yet eligible for parole.

In the case of *White* v. *Steigleder, supra,* the Court was confronted with the problem present in the Greenhaus case. The Court of Appeals for the Tenth Circuit, in determining that the trial court has the power to grant probation, stated at page 859:

> "It is urged that appellee is not entitled to the benefits of probation, because he was imprisoned some four months before he was released by a supersedeas bond on his appeal. We doubt if the fact in such a case would affect a right to probation, the convictions not having reached finality. But the fact does not appear in the record. And assuming there was a partial service of the sentence, it was necessarily for the separate offense charged in count I of the indictment and not for the different offenses charged in the remaining counts wherein sentence was deferred until the expi-

ration of sentence on the first count. Clearly, sentence has not begun under the counts affected by the probation order."

In his dissenting opinion in the *Phillips Case*, Judge Collet said, 212 F. 2d 327:

"It is suggested that the revisers of Title 18 of the Code did not intend that the functions of the judiciary relating to probation should overlap or conflict with the functions of the executive branch of the government with reference to custody and good time. The inference appears to be that from the revision should be read into the law a purpose to limit the long-established practice of pronouncing separate sentences for the purpose of reserving jurisdiction to suspend one or more later if the facts warrant. But, as stated in *Kelly* v. *United States*, 209 F. 2d 639 (10 Cir.), decided January 27, 1954, wherever a substantive change was intended by the revision, the reviser's notes so indicate. The reviser's notes indicate that there was no intention to change the power of the courts to suspend sentence and grant probation at any time before the service of the sentence begins. *Kirk* v. *United States*, 185 F. 2d 185 (9 Cir.); *Kelley* v. *United States*, *supra*. Hence, the crux of the present question is whether sentences which are separate and distinct at the time of original sentence automatically and irrevocably become one indivisible general sentence immediately upon the commencement of the service of the first. Or, as stated in the majority opinion, do the sentences, conceded to be separate and several at the time of imposition for purposes of probation, become 'for purposes of custody, the exact equivalent of a general sentence of imprisonment for the same number of years'? To warrant that assumption it is necessary to assume that the power of probation is abruptly and automatically shut off by incarceration on an antecedent sentence and custody is the only remaining function to be performed. That assumption is not sound, yet it is made the ground for denying

any remaining power in the courts over sentences not yet begun. That, of course, is the exact purpose and effect of the majority opinion. But it seems to me that to give the Act such a narrow construction is unwarranted and not consistent with recognized rules of statutory construction of remedial legislation.

And it is to be said that the retention of the power later to suspend a sentence the execution of which has not yet begun, will cause harassment of the District Courts the answer is that those courts may, in a case free from doubt as to the proper duration of imprisonment, impose a general sentence on all counts and forever bar any application for suspension and probation as to any part after its service has begun. But if the court is in doubt, and that must inevitably be the case in many instances, it should have the power, as it has been done in the past, to pronounce separate sentences of imprisonment and thereby reserve the power later to suspend one or more, the service of which has not yet begun. In the latter cases the District Courts have the absolute discretion to hear or not to hear applications for probation with or without the presence of the defendant. And their refusal or consent to do so, and their action in granting or refusing to grant probation on the merits of each case, are not subject to appellate compulsion or review. *United States* v. *Williams*, 12 F. 2d 65.

The original Probation Act by implication and the amended Act explicitly give the power to the courts to pronounce separate sentences. Under the original Act, the power and jurisdiction of the courts over probation extend to the time of the beginning of the execution of the several sentences. That power is not changed by the revision. Probation is by statute a judicial, not an executive function. There is nothing in the original Act or the revised Code which indicates a legislative intent automatically to divest the courts of jurisdiction over probation as to a sentence not commenced, when the custody of a defendant is vested in the executive on another sentence. And there is noth-

ing in the Code which requires a merger of all sentences into one and a figurative transfer of jurisdiction over probation from the courts to the penal authorities as to sentences not yet commenced. In my opinion the majority opinion does that, without legislative sanction."

From the foregoing it is clear that there is an irreconcilable conflict in the decisions of the four Circuits.

CONCLUSION.

This court has accepted jurisdiction of this case no doubt by reason of the conflict discussed herein.

It is strongly urged that this court rule that a district court assessing sentences to run consecutively that said sentences are not merged into a single sentence but that the court, at any time before commencement of the service of any sentence to be served, may suspend execution of that sentence and place defendant on probation.

The trial judge who heard the evidence and saw the defendant in court, with the record of his behavior while confined, should not be deprived of the right to place defendant on probation. Should the terms of probation be violated, then this same judge, with full knowledge of the background of the defendant and the crime committed could readily re-assess punishment to the defendant.

From the foregoing it is urged that this court reverse the decision of the United States Court of Appeals for the Eighth Circuit, and direct the District Court to entertain the motion filed therein.

Respectfully submitted,

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